In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

CHARLES M. GILEO,
Respondent.

REPLY BRIEF ON WRIT OF CERTIORARI.

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INTRODUCTORY STATEMENT.

This is the reply of respondent Charles M. Gileo to the brief filed by the petitioner Southern Pacific Company. The questions and issues raised in this case are in general the same as those presented by the actions involving the other named respondents.

STATEMENT OF THE CASE AND SUMMARY OF FACTS.

The petitioner Southern Pacific Company is a common carrier by rail engaged in interstate commerce.

The respondent, Charles M. Gileo was a carman regularly employed by the Southern Pacific Company. At the time of the accident in question, his job rights were controlled by his position on the regular Southern Pacific Company seniority lists. (R. 28.) At the time of his injury, the respondent was engaged in the petitioner's program of constructing new railroad cars. There was no date set for the completion of this program; it was purely temporary to meet a shortage of cars to be used in interstate commerce by the Southern Pacific Company and its subsidiary, Texas & New Orleans Railroad Company.

The Southern Pacific Company was confronted with a shortage of cars to carry on its interstate commerce business and the interstate commerce business of its subsidiary company, Texas & New Orleans Railroad Company. To meet this shortage, the Board of Directors of the Southern Pacific Company arranged for the manufacture of the cars at Sacramento, California. These cars were to be used in interstate commerce by the petitioner and its subsidiary. The cars were for the furtherance of the business of petitioner and its subsidiary only. (Def. Ex. A.R. 140.)

A method of financing the construction work was set up by the Southern Pacific Company through its subsidiary the Southern Pacific Equipment Company, and the Pennsylvania Company for Banking and Trusts. (Def. Ex. G, H.R. 149, 150, 151.)

All the work was done by the regular employees of the Southern Pacific Company who were given their

jobs in accordance with the regular seniority lists of that company. (R. 28, 29.)

The respondent Charles M. Gileo was a journeyman carman, and a qualified welder in the regular employ of the petitioner, working in the general shops of petitioner at Sacramento, California. (R. 94, 110.) In February of 1951 respondent Gileo bid for and got a job as a welder in Car Shop No. 9 to work on the construction of new railroad cars. (R. 95.) On July 11, 1951 he was injured while engaged in constructing new gondola cars. (R. 97.) The shop where the work was being done was known as Car Shop No. 9 and was divided into two parts, one doing repair work and the other constructing new cars. The shop consisted of ten parallel tracks, e.g.

10. .....
9. .....
8. .....
7. .....
6. .....
5. .....
4. .....
3. .....
2. .....
1. .....

The new construction work was done on tracks 10 and 9, and running repairs on cars in interstate service were done on tracks 1 and 2. Heavy and general repair work was done on the six in-between tracks. The distance between tracks was twelve feet. (R. 32, 33.)

These carmen, all on the same seniority list and in the same union, were *working side by side on these tracks* and their duties were interchangeable, and they could bid on the jobs of their selection on the various tracks according to their seniority.

Shop No. 9 was under control of one general foreman, with an assistant foreman for new construction and one for heavy repairs on old equipment. (R. 26.)

The men working in this car shop were assigned back and forth from the new work to repair work and there was a ten percent absenteeism from the new car construction that was taken care of by men doing repair work on old equipment. (R. 36, 37, 38.) The respondent was at all times subject to call in repair work or to transfer to such work on a shutdown on Track 9. The Southern Pacific Company retained control of the respondent in his work and assignments, subject to his rights on the seniority list of that company. (R. 29.) While on new construction that was respondent's regular job until completion of the program, or until through the seniority list he could move to a better one or unless there was a shutdown.

QUESTION PRESENTED.

This appeal presents the following broad question:

Was the Supreme Court of the State of California is error in holding that a regular employee of a common carrier by rail was entitled to recover damages for injury under the provisions of the Federal Em-

ployers' Liability Act as amended in 1939, (45 U.S. C.A. 51), where such a regular employee was, to meet a temporary shortage, engaged in constructing new cars to be used in interstate commerce by that company and its subsidiary only?

ARGUMENT.

(a). THE DUTIES OF RESPONDENT WERE COVERED BY THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C.A. 51).

The petitioner is a common carrier engaged in interstate commerce. The respondent was a regular employee of that common carrier, the petitioner Southern Pacific Company. The petitioner admits that it was faced with a shortage of railroad cars to carry on its business of a common carrier by rail. (Def. Ex. A.R. 140.) So, to further its business as a common carrier and to keep this commerce in operation, (Def. Ex. A.R. 140), it used its regular employees to construct additional equipment, to-wit, new cars. It did not enter into a new business. Its business at all times was that of a common carrier by rail. The act as amended states:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."
>
> 45 U.S.C.A. Sec. 51.

The respondent Gileo was constructing new cars for the petitioner, not for sale, or as a business, but so that the petitioner Southern Pacific Company could continue unimpeded in its interstate commerce operation. And the test under the statute as amended is:

> "Are these duties (duties of the respondent) and their due execution a natural step in an interstate operation; would this elimination affect or impede commerce."
>
> *Overstreet v. North Shore Corporation,* 318 U.S. 125, 63 S.Ct. 494 (1943).

Certainly this test is squarely met by the occupation of respondent, for had the function of petitioner been eliminated or performed improperly there would not have been adequate equipment to carry on fully the interstate business of the petitioner, and in consequence, the interstate commerce operations of the petitioner would have been impeded and affected.

And, where, as here, under the Federal Employers' Liability Act as amended, an employee is engaged in

work, "any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce," (45 U.S.C.A. 51) the Supreme Court of California, clearly and correctly, held respondent to have been performing duties that affected interstate commerce "directly or closely and substantially", and that the construction of the new cars clearly "furthered such commerce." (R. 229, 232.)

It seems idle argument to say, as petitioner does, that because it attempted to acquire sufficient equipment adequately to further its business as a common carrier by using its own employees to manufacture new cars to supply that deficiency that it stepped into the category of a manufacturer and out of the business of a common carrier. The sole and only purpose of making the new cars was to further and aid the business in which petitioner was engaged, a common carrier by rail. This purpose was succinctly expressed by the resolution of the Board of Governors in the following language, ". . . additional freight cars are urgently needed to handle commercial carloadings and increasing Government military shipments." (Def. Ex. A, R. 140.) Petitioner in its brief points to no other purpose or intent. This manufacture of new cars was but an incident to the uninterrupted business of the petitioner as a common carrier by rail.

The employees engaged in this new construction, when absent, were replaced by employees engaged in general repairs. (R. 37, 38.) When this workman

was doing work on the new construction would he be outside the coverage of the Federal Employers' Liability Act? Certainly under the Act as it now reads his remedy for injury would be under that Act. Prior to 1939 he would have fallen under the confusing "moment of injury" interpretation of the Act and his compensation would have been under the state statute. It was this confusion resulting from such *working side by side* on tracks but twelve feet apart that the Act as amended was intended to remedy, making the test simply whether or not the work being done was in furtherance of interstate commerce, or did it in *any way* directly or closely and substantially affect such commerce.

As stated by this Court in *Mitchell v. Vollmer & Co.*, 349 U.S. 427, 99 L.Ed. 1196, the test must be a practical one.

> "We do not think that case should control this one. We are dealing with a different Act of another vintage—one that has been given a liberal construction from A. B. Kirschbaum Co. v. Walling, 316 US 517, 86 L. ed 1638, 62 S. Ct. 1116, to Alstate Constr. Co. v. Durkin, 345 US 13, 97 L.ed 745, 73 S.Ct. 565. The question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical conceptions. See Walling v. Jacksonville Paper Co., 317 US 564, 570, 87 L.ed 460, 467, 63 S.Ct. 332; Overstreet v. North Shore Corp., 318 US 125, 128, 130, 87 L.ed 656, 660, 661, 63 S.Ct. 494. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facil-

ity of interstate commerce as to be, in practical effect, a part of it rather than isolated, local activity. See McLeod v. Threlkeld, 319 US 491, 497, 87 L.ed. 1538, 1543, 63 S.Ct. 1248. Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act, as we held in J. F. Fitzgerald Constr. Co. v. Pedersen, 324 US 720, 89 L.ed 1316, 65 S.Ct. 892. And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category."

It was the intent of those framing the amendment to eliminate this confusion of "time" tests, and questions of new or old construction and to broaden the Act to cover employees such as respondent.

"It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce."

(See Senate Judiciary Committee Report, Appendix Petitioner's Brief, p. 3.)

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially, affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act."

(See Senate Judiciary Committee Report, Appendix, Petitioner's Brief, p. 4.)

Here, in spite of the amendment, and in spite of the avowed purpose of the amendment as expressed by the Judiciary Committee, the opposition would have *these men working on these ten parallel tracks with duties and seniority interchangeable* subject to the old "moment of injury" test. This situation differs none at all from the expressed example given by the Judiciary Committee that it was intolerable and unreasonable to class switchmen working on parallel tracks as either being in interstate or intrastate work depending on the class of commerce being handled by each individual at the "moment of injury". Under the old rule, one man at one moment would be in local commerce while his fellow worker on the same union seniority list on the adjacent track might be in interstate commerce. It was to eliminate this distinction among others which caused the committee to point this situation out as a prime example of the purpose of the amendment.

The respondent was an employee of a common carrier by rail. The Southern Pacific Company was never in any other business. To attempt to compare employees of the Pullman Company or Railway Express with employees of the Southern Pacific Company is fallacious because those companies are not common carriers by rail, and their employees never could have been and never have been covered by the Federal Employers' Liability Act.

It seems clear that under the present wording of the Federal Employers' Liability Act as amended (45 U.S.C.A. 51) if the duties of the employee "shall be

in the furtherance of interstate or foreign commerce; or shall *in any way* directly or closely and substantially affect such commerce", then he is covered by the Act. So long as the employee's duties fall under either of the foregoing categories there is liability under the Federal Employers' Liability Act. Consequently, the old tests of "moment of injury" and whether the employee in his work wore a white shirt or a work shirt or whether the work was new or old, have been eliminated. This maze of uncertainty created by the above antiquated tests of "time", "clothing" and new or old work has been cleared and removed by the amendment of 1939. The petitioner seeks here again to create fine distinctions, technical barriers and uncertainty, by a theoretical and critical analysis of cases prior to the amendment of 1939 in an attempt to show that they are still controlling.

It is submitted that the Supreme Court of the State of California correctly held that these old cases are no longer to be considered and that respondent was entitled to the benefits of the Federal Employers' Liability Act as broadened and clarified by the amendment of 1939.

(b) GENERAL COMMENT ON PETITIONER'S ARGUMENT AND LAW.

(1) The Law.

The petitioner has cited numerous cases that arose prior to the amendment of the Federal Employers' Liability Act in 1939. We will not attempt to enumerate them here as they are too numerous. However, on

this point we wish to say that the very purpose of the committee proposing the amendment was to eliminate this mass of confused litigation by broadening and clarifying the act. The gist of petitioner's argument is that the old tests of "moment of injury" and "work shirt" as opposed to "white shirt" and new as opposed to old work should still be applied under the new law. These old cases and this reasoning, as stated above, passed with the amendment, which is a new law, with a new and practical outlook.

Mitchell v. Vollmer & Co. (supra).

The new law now covers the employee of a common carrier by rail "if any part of 'his duties', as such employee, shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially affect such commerce."

Cases decided prior to this law are no longer controlling and will not be discussed.

The principal case relied upon by the petitioner is *Mosher v. Union Pac. R. R. Co.*, 147 Pac. 2d 336, decided since the amendment. The Supreme Court of the State of California would not approve of that decision, and it is also in conflict with the following cases:

Shelton v. Thomson, 148 F. 2d 1;
Brainard v. A. T. & Santa Fe, 89 F. Supp. 921;
Agostino v. Pennsylvania R. Co., 50 F. Supp. 726;
Ericksen v. Southern Pacific Company, 39 Cal. 2d 374;

Southern Pacific Co. v. Industrial Accid. Com., 19 Cal. 2d 283;

Wills v. Terminal R. Assoc., 205 S.W. 2d 942;

Trucco v. Erie R. Co., 45 A. 2d 20;

Jordan v. Baltimore & Ohio R. Co., 62 S.E. 2d 806;

Robinson v. Pennsylvania R. Co., 214 F. 2d 798.

It is also in conflict with *Mitchell v. Vollmer & Co.* (supra).

Petitioner has cited several cases involving the Jones Act (36 U.S.C.A. 688). Those cases are not in point as they turn on the question of "situs." If the vessel is on navigable waters the act applies. If not, the act does not apply. There is no common ground of analogy between the two classes of cases as applied to the facts of the actions involved here.

(2) Argument of Petitioner.

Petitioner argues that, at the time of the injury to respondent, it was not engaging in interstate commerce as a common carrier by rail, but was making new cars. Petitioner further argues that being engaged in manufacturing new cars, the injured employee was not covered by the act as the first paragraph requires the employer to be engaging in interstate commerce (or transportation) by rail, at the time of injury. This is merely an attempt upon the part of petitioner to reverse the old argument of "moment of injury" and apply it to the employer. This type of argument is basicly false. The sole and only business of the Southern Pacific Company at the time

of the injury to respondent was that of a common carrier by rail engaging in interstate commerce. The only purpose for the manufacture of the new cars was to further that business and keep it going unimpeded by shortages of cars. (Def. Ex. A, R. 140.)

There could be situations where the act would not apply. If, for example, a railroad company developed oil wells and hired employees to operate the wells, then clearly if the oil was not used in the operation of the railroad, but was sold on the open market, the railroad would not in that instance be engaging in interstate commerce by rail, nor would the employee. That is not the situation here. What the employer was having done and what the employee was doing were activities done for the furtherance of interstate commerce, for a company engaging in interstate commerce by rail.

It is beside the point to argue, as petitioner does, that fine distinctions and technical barriers preventing the employees of railroad from recovery for injury under the Federal Employers' Liability Act are not harmful for the reason that the employee still has access to compensation under state laws. The very reason that the employees seek recovery under the Federal Employers' Liability Act with the burden of establishing liability upon the part of the railroads is because of the grossly inadequate compensation paid under State Compensation Laws. Take for example, the engineer who earns some $600.00 a month, if injured and off work, the only compensation he will re-

ceive from the State of California is the maximum $120.00 a month. This is a question for the legislature and not for the courts.

SUMMATION.

Prior to the amendment of 1939, the Federal Employers' Liability Act provided that every interstate rail carrier "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

A great deal of confusion was created among railroad workers, under this language, as to whether or not they were engaged in interstate or intrastate commerce at the "moment of injury". (See cases collected in 10 A.L.R. 2d 1279). And a great many workers were deprived of the benefits of that act by this confusion, or were required to try two cases to have their rights determined.

Because of this confusion the 1939 amendment was added:

> "An employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."
>
> (45 U.S.C.A. 51.)

As stated by the Judiciary Committee of the Senate, the first objective of the amendment was:

> "It broadens and clarifies the law in its application to employees who may be injured or killed while in the service of a railroad company engaged in interstate or foreign commerce."

(From report by the Committee on Judiciary, see Appendix A, Petitioner's Brief, p. 3.)

The amendment broadened the act in two ways. First, the so-called "moment of injury" test and other artificial tests such as whether the work was "new construction" or old were eliminated by the phrase "any part of whose duties". This new phrase sets up a definite test and clearly makes the general nature of the employee's duties the controlling factor. If "any part" of those duties furthers interstate commerce, the employee is certainly covered. This, even though at the "moment of injury" the particular mechanical task he was performing may have been purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way "closely and substantially" affected the furtherance of interstate commerce. The amendment is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, or if any part of his duties in any way directly, or closely and substantially affect such commerce.

Certainly here the respondent, who was making railroad cars so his employer, as a common carrier by

rail, would not have to slow down or stop its operation in interstate commerce because of a shortage of such cars, was performing duties both as to furthering interstate commerce and closely and substantially affecting such commerce.

CONCLUSION.

It is submitted that the Supreme Court of the State of California was correct in holding that the duties of the respondent were such at the time of his injury, that he was entitled to the benefits of the Federal Employers' Liability Act under its present broadened and clarified scope, and that, therefore, the judgment of that Court should be affirmed.

Dated, Oakland, California,
April 9, 1956.

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